Supreme Court of the United States

October Term, 1960

No. 12

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,

Petitioner,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

JOHN J. ABT,
320 Broadway,
New York, N. Y.,

JOSEPH FORER,
711 14th St., N. W.
Washington, D. C.,

Attorneys for Petitioner.

INDEX

		PAGE
I.	The Registration Provisions and the First Amendment	1
II.	The Sanctions and the First and Fifth Amendments	6
	A. Labelling	6
	B. The Other Sanctions	7
III.	The Privilege Against Self-Incrimination	10
IV.	The Predetermination of Facts Essential to the Finding that Petitioner Is a Communist-Action Organization	12
V.	The Necessarily Biased Board	15
VI.	The Misconstruction and Misapplication of the Act	16
	A. Reliance on Evidence of Discontinued Practices	16
	B. The 13(e) criteria	16
VII.	The Insufficiency of the Evidence	19
VIII.	The Failure to Remand Upon Striking the Finding on "Secret Practices"	22
IX.	The Refusal to Strike Budenz' Testimony	23
X.	The Refusals to Require Production of Witnesses' Statements	25
	A. The Gitlow Memoranda	25
	B. The Statements of Budenz and the Other Witnesses	26

Cases Cited

	PAGE
Adler v. Board of Education, 342 U. S. 485	9
American Communications Association v. Douds, 339 U. S. 382	8
Bochm v. United States, 123 F. 2d 791	24
Boyd v. United States, 116 U. S. 616	11
Butler v. Michigan, 352 U. S. 380	8
Communist Party v. S. A. C. B., 351 U. S. 115	26
Crosby v. Pacific S. S. Lines, 133 F. 2d 470	24
De Jonge v. Oregon, 299 U. S. 353	4
Garner v. Board of Public Works, 341 U. S. 716	10
Gerende v. Board of Supervisors, 341 U. S. 56	10
Herndon v. Lowry, 301 U. S. 242	4
Jencks v. United States, 353 U. S. 657	24
N. A. A. C. P. v. Alabama, 357 U. S. 449	6
N. L. R. B. v. Newport News Co., 308 U. S. 241	23
N. L. R. B. v. Virginia Electric & Power Co., 314 U. S. 469	22
Schneiderman v. United States, 320 U. S. 118	19
Thomas v. Collins, 323 U. S. 516	4
United States v. De Normand, 149 F. 2d 622	24
United States v. Krulewich, 145 F. 2d 76	24
United States v. Lebron, 222 F. 2d 531	24
United States v. Schneiderman, 106 F. Supp. 731	24
United States v. Simonds, 148 F. 2d 177	24
United States v. White, 322 U. S. 694	12
Wieman v. Updegraff, 344 U. S. 183	9
Yates v. United States, 354 U. S. 298	4

Miscellaneous Citations

Eisenhower, Dartmouth College Address	6

Supreme Court of the United States

October Term, 1960

No. 12

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,
Petitioner,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF FOR PETITIONER

I. The Registration Provisions and the First Amendment

A. Respondent defends the Act as a reasonable means of dealing with an evil which "is one of the gravest that could befall the nation" (Br. 93). The evil is described (Br. 94) as "the threatened destruction, through force, violence and deceit, of our constitutional form of government, the loss of our national independence and of our cherished liberties, and the passing of the nation under the domination of a ruthless foreign dictatorship."

Our principal brief (pp. 28-33) showed that the Act cannot be justified on this ground because sections 3(3) and 13(e) authorize the issuance of a registration order against, and the outlawry of, an organization which does not practice or incite to force, violence or other illegal means, but seeks to achieve its socialist objective peaceably. As we further showed (*ibid.*), the order against petitioner was issued and

affirmed without evidence or findings, of any such conduct by petitioner.

Respondent replies to our showing with self-contradictory arguments. When it defends the constitutionality of the Act, it insists (Br. 104) that section 3(3) authorizes the issuance of registration orders only against organizations "whose *present activity* is for the purpose of advancing the objectives of the World Communist movement, including * * * the overthrow of the Government of the United States by illegal means" (emphasis in original). But when respondent defends the order of the Board, it argues (Br. 261), "Section 3(3) requires proof, however, only of the organizations' objectives, not as to its particular methods." Accordingly, it urges (*ibid.*) that "the objectives requirement is satisfied by proof that an organization operates in order to establish a Communist totalitarian dictatorship" without proof that the organization practices or incites force, violence or other unlawful means for the attainment of its goal.

Respondent cannot have it both ways. If the Act authorizes the issuance of a registration order without proof that the accused organization uses or incites to illegal means, it unquestionably violates the First Amendment and due process. If the Act requires such proof, the order of the Board must be set aside because the Board did not find, and on the evidence could not have found, that this requirement was satisfied.[1]

B. In defending the Act, the respondent, as we have seen, includes in the evil to which the Act is addressed, "the

[1] Respondent states (Br. 262) that "even if proof of force and violence is necessary, it is amply shown in the record before the Board," citing its discussion of the "allegiance" criterion, Br. 248-53. As this discussion shows, the "proof" consisted entirely of excerpts from the literature of Marxism-Leninism and the conclusory opinion testimony of informer witnesses. This evidence does not by any stretch establish incitement to violent overthrow, and the Board found no such incitement. See Pet. Br. 32.

passing of the nation under the domination of a ruthless foreign dictatorship" (Br. 94). But in defending the Board's order, the respondent contends (Br. 262) that the Act does not require proof that an accused organization seeks to establish in this country a government subservient to a foreign power.[2]

Hence, by the Government's own argument it again appears that the Act's restraints on assembly and expression are not predicated on the existence of the evil it is supposed to remedy.

C. In defending the Act, respondent emphasizes the gravity of the evil by stating that it involves a "group controlled or dominated by a foreign country or foreign organization" (Br. 94). And respondent quotes the observation of the court below that "antipathy * * * to interference on the part of a foreign government, is a basic policy in this nation" (Br. 94-95).

But in defending the Board's order, respondent construes the foreign control component of section 3(3) to mean nothing more than voluntary agreement with Soviet policies (Br. 253-56). Furthermore, respondent admits (Br. 235, ftn. 84) that the Board made no finding of Soviet directives to petitioner after 1940,[3] and it cannot contradict our showing (Pet. Br. 99-100) that there is no evidence of any significant Soviet contacts with petitioner after that date.

---

[2] Respondent states (Br. 263) that "even if Section 2(6) is construed as requiring proof of this additional objective, the evidence provides such proof." The "proof" consists of a far-fetched inference from counsel's interpretation of Marxist texts. Jugoslavia and China demonstrate that the inference has no foundation in reality. Moreover, the Board itself drew no such inference, and its findings negate the element of subservience (see Pt. Br. 104).

[3] In the light of this admission, we are unable to understand why respondent endorses the statement of the court below that the foreign control component is satisfied, "If the Soviet Union directs a line of policy and an organization voluntarily follows the direction" (Br. 256). If this be the test, it was not satisfied, there being no finding (or evidence) of a Soviet direction since 1940 at the latest.

Under respondent's construction of the Act, therefore, it appears that the Act requires no proof of "interference on the part of a foreign government" in the affairs of this country, or of foreign control of an accused organization in any realistic sense.[4] In this respect too, therefore, respondent's own argument shows that the restraints of the Act cannot be justified as being addressed to the claimed evil. Instead, the restraints are imposed for nothing more than an ideological agreement which is fully protected by the First Amendment.

D. Respondent asserts that the Act imposes only an indirect and incidental restraint on First Amendment rights. Accordingly, it is said (Br. 104-07) that the Act need not conform to the clear and present danger doctrine or to the principles of *DeJonge* v. *Oregon*, 299 U. S. 353; *Herndon* v. *Lowry*, 301 U. S. 242; *Yates* v. *United States*, 354 U. S. 298; and *Thomas* v. *Collins*, 323 U. S. 516. (See Pet. Br. 28-44.)

The argument rests on two premises. The first is that the Act is a simple disclosure statute having far less serious consequences on speech and association than criminal statutes (Br. 100-02, 105). This premise is obviously unreal to the point of being fanciful, for reasons which are stated in our principal brief (pp. 26-28)[5] and which respondent makes no attempt to rebut.[6]

The second premise is that "speech is not the basis for requiring the organization to register" (Br. 105). This premise is contradicted by section 13(e)(2), making "non-

---

[4] Any more exacting interpretation of foreign control would, of course, require that the Board's order be set aside for the lack of findings and evidence on the subject (see Pet. Br. 98-102).

[5] See also the amicus briefs: National Lawyers Guild, pp. 4-13; individual amici, pp. 8-12; American Civil Liberties Union, pp. 6-7.

[6] For the same reasons, respondent's citation of cases dealing with non-invidious, non-discriminatory, genuine disclosure statutes (Br. 88-91, 174, 179-83) is beside the point as to both the registration and labelling requirements.

deviation" one of the standards of Board decision; by the respondent's insistence that the foreign control component of section 3(3) is satisfied by agreement with Soviet views; and by the fact that both the Modified Report and respondent's brief rely almost exclusively on Marxist-Leninist literature for the "proof" that petitioner is a Communist-action organization.

E. Respondent seeks to fortify its view that the Act is a simple disclosure statute by urging the Court to view the registration requirement in isolation from the sanctions which the Act imposes on organizations ordered to register and on their members (Br. 85-86). The proposal is clearly unsound.

The Act provides that once a registration order becomes final, two sets of consequences follow automatically. First, the organization and its officers are under a duty, enforceable by criminal penalties, to file a registration statement. Second, the organization and its members incur onerous disabilities and liabilities. The latter penalties are not imposed for failure to register, but are operative *whether the organization registers or not.* No further action is required to put them into effect. Like the registration requirement, they are direct and immediate consequences of the order. It was an immaterial matter of draftsmanship that Congress attached these consequences to the order by force of the Act, instead of directing the Board to write them into the order, as in the case of the registration requirement.

It is manifestly impossible to assess the impact of the order without considering all its consequences, including the sanctions which it automatically triggers. Furthermore, once the sanctions become operative, as they will when the registration order becomes final, they will have an immediate, devastating effect upon the organization even before any attempt is made to enforce them. Their *in terrorem* presence will force members of the organiza-

tion to resign, compel financial supporters to withhold contributions, deprive the organization of an audience for its views, and outlaw it.

II. The Sanctions and the First and Fifth Amendments

A. Labelling

Respondent asserts that the Act's invidious labelling requirement "imposes no censorship" because the content of the matter mailed or broadcast "is immaterial" (Br. 173). But obviously a restraint of expression regardless of content is a more flagrant abridgment of speech and press than a restraint based on content. It is only on the basis of content (as where there is obscenity, fraud, or incitement to insurrection) that Congress has any power to abridge speech and press (Pet. Br. 38-39).[7]

Petitioner also contends (Br. 173) that the labelling provisions do not impose censorship because the ensuing restraints "are entirely social, not legal," being the product of public reaction. This argument was rejected by *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449, 463.

Respondent argues that the invidious label may be required in order to inform the public that an organization advocating legitimate reforms actually has an ulterior

---

[7] Cf. President Eisenhower's advice to the Dartmouth graduates of 1953: "Don't join the book burners. * * * Don't be afraid to go in your library and read every book as long as any document does not offend our own ideas of decency. That should be the only censorship. How will we defeat communism unless we know what it is? What it teaches—why does it have such an appeal for men? * * * Now we have got to fight it with something better. Not try to conceal the thinking of our own people. They are part of America and even if they think ideas that are contrary to ours they have a right to have them, a right to record them and a right to have them in places where they are accessible to others. It is unquestioned or it is not America." *N. Y. Times*, June 15, 1953.

motive for championing such good causes (Br. 175-179). The mere statement of the proposition is enough to refute it. It is a novel theory that bad motive alone justifies an exception to the First Amendment. If Congress may restrain speech which threatens no substantive evil simply because of the speaker's bad intentions, then the First Amendment is meaningless. See also amicus brief of American Civil Liberties Union, p. 7.

Respondent's argument that Congress may protect the mails and broadcast channels against fraudulent communications (Br. 181-82) is irrelevant. Since the Act's labelling requirements apply regardless of content, they restrain non-fraudulent matter protected by the First Amendment. Similarly, the fact that Congress can compel a non-invidious identification of broadcast sponsors (Resp. Br. 183-84) does not support a power to restrain speech by requiring an invidious identification.

B. The Other Sanctions

1. Respondent justifies the Act's sanctions as reasonable exercises of Congressional power in areas within the federal jurisdiction. If this were true, the sanctions would meet the test of due process, but not necessarily the more stringent clear and present danger test of the First Amendment. The member sanctions must be justified under First Amendment standards because they are imposed solely for the exercise of, and heavily deter, the right of association.

The fact is, however, that the Act's sanctions do not even satisfy the reasonableness requirement of due process. Respondent's argument to the contrary comes down to the proposition that if there is a danger (or if Congress has declared one), Congress may hurl an H-Bomb in its general direction, on the "reasonable" theory that no matter what else is slaughtered the peril will be eliminated.

Thus respondent argues that since Congress can forbid federal employees from engaging in partisan politics, it can

forbid them and employees of private "defense facilities" from making contributions to petitioner for legitimate uses which have nothing to do with partisan politics (Br. 186-87). Since Congress can guard defense facilities against sabotage and espionage, it can exclude from employment at such facilities members of petitioner even if they have no desire, tendency, or opportunity to engage in sabotage and espionage (Br. 190-94). Since *Douds* held (we think incorrectly) that Congress can, as a means of preventing political strikes affecting interstate commerce, put pressure on unions to remove Communists from leadership positions, Congress can prohibit Communists from holding non-leadership union employment having nothing to do with strike policy or interstate commerce (Br. 194-98). Since Congress can prevent persons from travelling abroad to commit espionage, it can prevent Communists from travelling abroad for such innocuous purposes as collecting a legacy, studying ancient ruins, or comforting a dying parent (Br. 198-201). Since Congress can revoke naturalizations obtained by fraud, it can revoke naturalizations by inventing an irrational presumption of fraud (Br. 203-04). None of this is good law. See *Butler* v. *Michigan*, 352 U. S. 380, 383.

2. Respondent asserts that the member sanctions do not affect innocent persons because they apply only to those who remain members with knowledge or notice that the organization has been condemned after an administrative hearing and judicial review. It scoffs at the notion "that it is not permissible to impose sanctions on a member if he does not agree * * * with the formal finding made by the Board and upheld by the courts" (Br. 205-06).

Respondent is wrong. A person cannot constitutionally be branded and discriminated against as a loyalty and security risk merely because he is so stubborn (as well as courageous and possibly right) as to disagree with an estimate of the Board and the courts. Otherwise he is punished for nothing more than non-conformity.

This is established by *Adler* v. *Board of Education*, 342 U. S. 485, and *Wieman* v. *Updegraff*, 344 U. S. 183. The statute involved in *Adler*, like the Act, provided for a hearing to the organization and judicial review. Nevertheless, in upholding the statute, the Court stated (at 494-95, emphasis supplied):

> "Membership in a listed organization found to be within the statute *and known by the member to be within the statute* is a legislative finding that the member by his membership supports the thing the organization stands for, namely, the overthrow of government by unlawful means. We cannot say that such a finding is contrary to fact or that 'generality of experience' points to a different conclusion. Disqualification follows therefore as a reasonable presumption from such membership and support. Nor is there here a problem of procedural due process. *The presumption is not conclusive but arises only in a hearing where the person against whom it may arise has full opportunity to rebut it.*"

According to respondent, the only element in the quoted text that is necessary to satisfy due process is that the organization be "found to be within the statute." Its argument eliminates the other two elements which the Court recognized as indispensable—knowledge by the member that the organization is (not was found to be) of the objectionable kind, and an opportunity to the member to rebut the presumption of disqualification arising from such knowing membership.

Respondent misinterprets our reliance on *Adler* (Br. 208). We did not cite *Adler* for the proposition that the member must be permitted to relitigate the character of the organization. What we said (Pet. Br. 52), and what *Adler* holds, is that a finding that an organization is disloyal cannot, consistently with due process, conclusively establish the disloyalty of its members. The members must be allowed an opportunity to rebut any presumption of dis-

loyalty arising from membership before sanctions can be imposed upon them. Since the Act provides no such opportunity, it violates due process.[8]

Respondent misreads *Wieman* in representing that it applies only to former members (Br. 206-07). The test oath it struck down related to both present membership and membership within the preceding five years. The decision was squarely based on the oath's failure to allow for the absence of scienter and made no distinction between present and past members *Wieman* itself stated (at 188) that it was decided "in the context of" three decisions (*Adler; Garner* v. *Board of Public Works*, 341 U. S. 716; *Gerende* v. *Board of Supervisors*, 341 U. S. 56) which established scienter as a constitutional requisite. Yet two of these cases (*Adler* and *Gerende*), involved only present membership.

Respondent's theory that organizational membership *ipso facto* makes an individual a security risk is particularly terrifying because it justifies sanctions imposed not only on members of the petitioner and other organizations proscribed under the Act, but also on the many others who artificially and unwittingly acquire "membership" in petitioner by the operation of section 5 of the Communist Control Act.

III. The Privilege Against Self-Incrimination

Respondent contends (Br. 108-12) that this issue is premature until petitioner's officers personally claim their privilege. According to respondent, the officers and all members of petitioner's governing body (Br. 115, ftn. 36)

---

[8] The sanctions are invalid for the additional reason that they are imposed on the members notwithstanding the fact that an organization may be found to be a Communist-action organization without proof that it engages in illegal advocacy or criminal activity (see Pet. Br. 29-32).

should assert their privilege "on the registration form required to be filed with the Attorney General" (Br. 110). This ignores the fact that such an assertion of the privilege is itself an incriminating admission, made, moreover, to the government's chief prosecutor (see Pet. Br. 48).

Respondent's refusal to recognize this fact blinds it to the applicability of *Boyd* v. *United States*, 116 U. S. 616, which decisively refutes all of respondent's arguments. As respondent points out (Br. 110-11), the statute considered in *Boyd* presented a suspected tax evader with the alternative of (1) producing his books to refute the charges against him or (2) suffering the charges to be taken as confessed. As respondent states (Br. 111), "In the context of such a statute, a claim of privilege would have been quite meaningless." It was for this reason, as respondent observes, that the Court voided the statute without reference to the doctrine that the privilege must be asserted if it is to be availed of. For the same reason, the Court did not permit the statute to survive for application to cases in which the privilege might be waived.

The alternative with which the registration order confronts petitioner's officers is even less satisfactory than that in *Boyd*. The officer must choose between making an incriminating admission by signing a registration statement or making the same admission by claiming his privilege not to sign the statement. Here an assertion of the privilege would be worse than "quite meaningless." It would itself be incriminating. Hence, as in *Boyd*, the principle that the privilege must be claimed in order to be relied upon is inapplicable.

Respondent's blind spot also appears in its argument that, "Even assuming that a claim of privilege will be made and must be honored, this would make the order to register at most unenforceable, not void" (Br. 119). This argument proceeds on the same fallacious premise that petitioner's officers must claim the privilege in order to

have it honored. As we have seen, however, there is no place other than this proceeding in which their privilege can be honored. And the only way in which that can be accomplished is by holding the registration order invalid in this proceeding.

The situation here is identical with that presented in *Boyd* where, as respondent states (Br. 111), "The statute was held void as *necessarily* conflicting with the privilege." The Act and the registration order must be held void for the same reason.[9]

IV. The Predetermination of Facts Essential to the Finding that Petitioner Is a Communist-Action Organization

Respondent acknowledges that the existence and nature of a world Communist movement as described in section 2 are not "subject to litigation in a particular proceeding under the Act" (Br. 131). Simultaneously, it recognizes that the existence of a world Communist movement as described in section 2 is "crucial" to making "the Act operative against petitioner" (Br. 129). It contends, nevertheless, that this legislative predetermination does not violate due process on the ground that the existence and nature of the world Communist movement are legislative, not adjudicative, facts. The former it describes as "general conclusions which support the policy of a particular law." The latter are facts, "which, on proof in adversary litigation, bring a specific person or organization within the purview of the legislation, or otherwise make the general terms of the legislation specifically applicable." (Br. 130.)

---

[9] Respondent's arguments (Br. 112-19, 121-25) that the privilege is not available to petitioner's officers because of the rule with regard to association records (*United States* v. *White*, 322 U. S. 694) and because the officers may have waived the privilege, are fully answered in our principal brief, pp. 46-47, 49-50.

The findings in section 2 were, of course, intended to "support the policy of" the "particular law." The difficulty, however, is that Congress did not stop there. Instead, it made liability under the Act dependent on the existence of the same "facts," which are only found legislatively. It did this by incorporating in section 3(3) the findings of section 2 as assumptions of fact which must be accepted by the Board and reviewing courts.

As the analysis in our principal brief shows (pp. 56-59), and as elementary common sense demonstrates, the existence, nature and objectives of a world Communist movement as defined in section 2 are indispensable factual elements to a conclusion that a particular organization (1) is controlled by the government or organization which controls that movement, and (2) operates to advance the objectives of that movement. Accordingly, the presence of these elements is a fact necessary to bring an organization "within the purview of the legislation" and to "make the general terms of the legislation specifically applicable." Respondent's brief makes no attempt to disprove our analysis. It merely offers an *ipse dixit* that the existence and nature of the world Communist movement are not adjudicative facts.

The hypothetical analogy suggested by respondent (Br. 131, ftn. 42) does not help its case. If indeed Congress should enact legislation authorizing an administrative agency to prohibit types of business activity found on the basis of evidence to deepen "the" world-wide economic depression, due process would require that a respondent in a proceeding before the agency be permitted to prove that there was in fact no depression which its activities could deepen. What impresses respondent about this analogy is the inefficiency of a system which would permit countless respondents to relitigate the same basic question. But the point is that Congress does not legislate such gaucheries. When Congress enacts economic legislation to alleviate a depression, it does not make the existence of a depression

the foundation of the administrative findings, even though it may be the reason for the enactment. Instead, it authorizes the administrative agency to make findings as to whether certain practices deemed harmful by Congress are being employed, such as unfair competition, wage cutting, price-cutting, etc.[10]

It is only in the Act that Congress has incorporated legislative findings into the ultimate standard to be applied by the administrative agency. It is only in the Act that elements essential to the determination of liability are facts found by Congress and removed from adjudication.

This legislative predetermination was not impelled by a need to avoid such wasteful relitigation as that contemplated by the Board's hypothetical analogy. For Congress intended that only one organization, the petitioner, should be charged as a Communist-action organization. But Congress knew that it had already enacted legislation prohibiting the seditious and insurrectionary conduct described in section 2 and requiring foreign agents to register. It also knew that the Attorney General had been unable to make out a case against petitioner under these statutes. The problem to which the authors of the Act addressed themselves was how to dispense with the embarrassing necessity of proving their accusations against petitioner. That is why the Act was passed, and that is why the legislative predetermination was made (Pet. Br. 67-71).

For the same reason, the authors of the Act also found it necessary to coerce an administrative determination of the other facts essential to guilt. It did this in section 2 by making findings on the identical subjects which were ostensibly to be determined by the Board (Pet. Br. 60-61). Respondent makes no attempt to defend this aspect of the legislative predetermination.

---

[10] The legislation may also, of course, be of temporary duration or subject to termination by a joint resolution or presidential proclamation declaring the end of the emergency.

The demonstration in our principal brief that the Act is an expedient to dispense with proof of guilt is corroborated and further documented by respondent's own description of the background and legislative history of the Act (Br. 50-56, 61-65).[11]

V. The Necessarily Biased Board

Respondent does not dispute our demonstration (Pet. Br. 74-78) that the Board was under compelling pressure to decide against petitioner in order "to sustain its *raison d'etre*" (Resp. Br. 134), and that the members of the Board had a personal, official and financial stake in the result. Instead, respondent misstates our contention as "charging that the structure and scheme of the Act are such that it would be impossible to staff the Board with members who would not enter upon their duties with the intention of violating their oaths of office" (Br. 134). The issue has nothing to do with violations of oaths of office. What due process requires is that the tribunal be free from pressures and inducements to decide against a litigant. Violation of the oath of office is a standard for impeachment, not for disqualification.[12]

---

[11] Respondent's description also supports our contention that the Act is a bill of attainder (Pet. Br. 63-72).

[12] We believe that the discussion in our principal brief (pp. 72-74, 79-95) makes it unnecessary for us to reply to respondent on the remaining constitutional issues.

VI. The Misconstruction and Misapplication of the Act[13]

A. Reliance on Evidence of Discontinued Practices

Respondent (Br. 266) accepts as accurate our summary (Pet. Br. 106-08) of the post-Act evidence on which the Board relied. Respondent concedes that the "evidence as to petitioner's post-1950 activities might, perhaps, not independently prove it to be a Communist-action organization," but claims that it "is at least sufficient to show that petitioner's character has not substantially changed" (Br. 268-69).

The only items of post-Act evidence which respondent deems worthy of mention (Br. 266-67), and which, accordingly, must be those which it considers to show a lack of "change", are: (1) the so-called "non-deviation" evidence, which establishes only that the petitioner and the Soviet Union agree on international questions (Pet. Br. 111-17); (2) petitioner's acknowledged adherence to the principles of Marxism-Leninism; and (3) the fact that prior to 1940 some of petitioner's officers had held positions in the Communist International and visited the Soviet Union.

This confirms our demonstration that the Board's order rests on nothing more than petitioner's exercise of First Amendment rights and on practices which, if ever engaged in, were discontinued long prior to the enactment of the Act.

B. The 13(e) Criteria

1. Respondent seems to concede that the findings of the Board under three of the criteria ("financial aid," "instruction and training," "reporting") do not lend sup-

[13] We do not consider it necessary to add here to our demonstration that the Board and the court below erroneously interpreted and applied the foreign-control and objectives components of section 3(3). See on the subjects Pet. Br. 96-104 and *supra*, pp. 2-4.

port to the Board's order. It seeks to convey the impression that the Board placed little or no reliance on the findings under these criteria, stating that "the Board did not mention its subsidiary findings" on these and the stricken "secrecy" standard "in making its ultimate determination" (Br. 232-33, ftn. 83).

But the fact is that the Board, when making its ultimate determination, did not mention any of its 13(e) findings (R. 2644). Yet it is clear that it relied on all of them as grounds for deciding against petitioner, including the three findings which respondent now disparages. Accordingly, it appears from respondent's brief that the order must be set aside because it is based in part on impermissible grounds.

2. Respondent supports application to petitioner of the "directives and policies" criterion solely on the grounds that petitioner adheres to Marxism-Leninism (Br. 236-40). Respondent states (Br. 240) that "following the principles of Marxism-Leninism * * * is in effect acting pursuant to the directives of the Soviet Union." The Modified Report made no such finding, and there is no evidence to support such a ludicrous interpretation of Marxist literature. On the contrary, as respondent elsewhere concedes (Br. 235, ftn. 84), the Modified Report found no Soviet directives to petitioner after 1940.[14]

3. Respondent justifies the Board's application of the "non-deviation" criterion on the grounds that (a) three of the views involved abrupt reversals of position and (b) four of the views were shown to have been adopted by the Soviet Union before they were adopted by petitioner

[14] Respondent states, citing the Modified Report, that Lautner "testified that Marxism-Leninism requires the complete subservience of all Communist Party organizations, including that in the United States, to the Soviet Union" (Br. 239). This is a complete invention, as can be seen by examining the Lautner testimony which the Board's Annotated Report cites to that effect. See R. 1854, ftn. 1, and R. 973-74. See also Pet. Br. 121.

(Br. 242-45). But these instances cannot justify the Board's reliance on views on 40 other international questions which did not involve abrupt reversals and which were not shown to have been first adopted by the Soviet Union. (See Pet. Br. 111-17.)

4. In our principal brief we described all the evidence on which the Board relied under the "discipline" criterion. The inescapable conclusion from our summary was that the Board misapplied 13(e)(6) by utilizing petitioner's self-adopted internal disciplinary practices to "prove" that petitioner's officers and members were under foreign discipline (Pet. Br. 121-22).

Respondent's brief (pp. 245-48) does not dispute the accuracy of our summary of the evidence on which the Board relied. Nor does it explain how instances of internal discipline can have anything to do with the foreign "discipline"-test of section 13(e)(6).

Moreover, the Board's application of the "discipline" standard contradicts the interpretation advanced by it to refute the charge that the standard irrationally permits an organization to be condemned on the basis of the attitude of an unrepresentative or dissenting minority of its members. Respondent states (Br. 147-48):

> "But the possibility of that result does not negate the propriety of the inquiry, which is into 'the extent to which' the organization's leaders and members are under foreign discipline * * * it is the *degree* * * * which the Board is directed to consider. If the evidence is equivocal or insignificant * * * the record will so show. It cannot merely be assumed that Congress intended the Board to be governed—or that the Board was governed—by trivial evidence or evidence having no real probative force with respect to the ultimate issue."

The Board, however, in applying the "discipline" standard (R. 2528-38) made no finding as to, and did not consider,

the "extent" or "degree" of the foreign discipline. And it clearly was "governed" by trivial evidence which had no probative force with respect to the criterion or to the ultimate issue..

5. Our principal brief (pp. 123-24) showed that the Board's finding on "allegiance" was inconsistent with *Schneiderman* v. *United States*, 320 U. S. 118. Respondent distinguishes *Schneiderman* on the ground that "the relevant literature" in that case "had been published prior to 1927" (Br. 250). But the Modified Report did not distinguish between the earlier and the later literature, nor does respondent indicate what the later literature added to the earlier. Moreover, one of the two "later" works to which respondent refers (Br. 251) is not "later" at all. Stalin's *Foundations of Leninism* was considered in *Schneiderman* (at 150-51) under its earlier title, *The Theory and Practice of Leninism*. Indeed, *Schneiderman* (at 151, ftn. 38) quotes from *Foundations* an excerpt quoted by the original Report (R. 718-19) and cited by the Modified Report (R. 2632).[15]

VII. The Insufficiency of the Evidence

Respondent urges the Court not to review the evidence (Br. 227-28). It is evident from the opinions below, it says, that the Court of Appeals "made a fair assessment of the record on the issue of the sufficiency of the evidence" (Br. 228). The facts are to the contrary.

Respondent primarily relies on the length of the court's discussion of the evidence in its original opinion (Br. 226). The original opinion, however, was based on a record which was tainted by the testimony of Matusow, Johnson and Crouch, now expunged. Moreover, the present record dif-

[15] For the reasons stated in the text, respondent is also wrong in arguing (Br. 260) that *Schneiderman's* discussion of the "dictatorship of the proletariat" is out-dated.

fers from that examined in the original opinion in other respects. Thus the Board struck the testimony of Budenz on the Starobin and Wiener matters (Pet. Br. 129), and rejected significant testimony of still other witnesses on which it had previously relied (R. 2383, 2549 ftn. 84, 2602 ftn. 109, 2511 ftn. 67). The findings of the Modified Report were likewise changed in important respects from those of the original Report. For example, the original Report found that petitioner currently receives and conforms to directives from the Soviet Union (R. 78-79). Yet, as we have seen, respondent itself now acknowledges (Br. 235 ftn. 84) that the Modified Report makes no finding of Soviet directives to petitioner after 1940.

The respondent's reliance on the second opinion of the Court below is also misplaced. Respondent represents (Br. 226) that this opinion "again considered the evidence before the Board." But the fact is that the court below itself stated in its explanatory memorandum of April 11, 1958, that it did not intend on its second review to affirm the Board's findings (Ops. 123).

This leaves the third and final opinion as the only "assessment" of the present record and findings. There the Court's discussion of the evidence consisted of one short paragraph (Ops. 131), plus one sentence (Ops. 125) asserting that "we have examined the Modified Report [not the evidence] in the light of these averments and think the findings are amply sufficient." The one-paragraph summary shows that the Court below did not fairly assess the record, that it misunderstood the requirements of the Act, and that the Board's order is not supported by the evidence (Pet. Br. 101).

That the court below did not fairly assess the record also appears from its handling of the concept of foreign "control." In its original opinion, the court held the evidence sufficient without giving any interpretation of the term "control." In its second opinion, after petitioner

pointed out that there was no evidence of any means by which the Soviet Union could or did exert compulsion on petitioner, the court explained (we think wrongly) that "control" includes a *voluntary* following of Soviet directions (Ops. 94). On the third review, accordingly, petitioner emphasized that there was no evidence or Board findings of any post-1940 Soviet directions which petitioner could follow, even voluntarily. The answer supplied by the third opinion was that "control" is satisfied by nothing more than adherence to the "cause of Communism" out of "intellectual affiliation" (Ops. 131-32).

Nor should the Court be deterred from considering the sufficiency of the evidence by respondent's ominous references (Br. 221-22) to the size of the administrative record. A study of the hearing record is unnecessary to determine the evidence issue. The opinion below and the Second Modified Report show on their face that the evidence is insufficient (Pet. Br. 126-27). For this reason our evidentiary discussions have almost without exception accepted the Board's evidentiary findings, loaded though they are. Our approach has been to show that these findings do not support the Board's intermediate and ultimate findings.[16]

---

[16] Moreover, the hearing record was artificially swollen by the indiscriminate admission of thoroughly remote and irrelevant evidence offered by the Attorney General. This explains why, despite the "14,000 typewritten pages of testimony" (Br. 221), the Modified Report acknowledges that "the really vital part of [the Attorney General's] case is documentary evidence, which to a considerable extent needs relatively little oral illumination" (R. 2409; ftn. 2). The unstricken testimony selected for printing occupies approximately 900 printed pages.

VIII. The Failure to Remand Upon Striking the Finding on "Secret Practices"

A. Respondent (Br. 276-80) urges the Court to review the evidence on "secret practices" and reverse the holding below that the Board's finding on the subject was not supported by the evidence. It seems clear, however, that as to this finding the court below did fairly assess the record. The court's determination was originally made (Ops. 73-74) on a record which included a mass of evidence on the subject, adverse to petitioner, which was later expunged or discredited. The court affirmed its ruling in its final opinion, correctly stating (Ops. 126), "No new evidence on the point has been added."

Furthermore, respondent's contention that the court below was wrong seems to rest entirely on its interpretation of "the 'Marxist-Leninist Classics' * * * and the official publications of the Comintern" (Br. 277). There is no evidence that petitioner shares or follows this interpretation.

B. Respondent charges (Br. 280) that the court below committed an error of law by holding "that the evidence must show that the practices were *either* intended to further Party objectives *or* were intended to protect its members." Contrary to this assertion, the court expressly stated that "the two purposes may well overlap" and "both purposes could exist together" (Ops. 74). Nevertheless, the court concluded (*ibid.*):

> "In a doubtful situation such as that on this point, we strike the finding as to purpose * * * On this point we conclude simply that a defined purpose is not shown."

C. Respondent attempts to distinguish *N. L. R. B.* v. *Virginia Electric & Power Co.*, 314 U. S. 469, by saying that it was unclear from the record on just what evidence the

administrative findings were based (Br. 283, ftn. 81). The Court, however, there specifically stated (at 479) that it was remanding the proceedings for administrative redetermination because, "it appears that the Board rested heavily on findings with regard to the bulletin and the speeches, the adequacy of which we regard as doubtful." Again the Court said (at 476):

> "But here the Board's conclusion that the Independent was a company-dominated union seems based heavily on findings which are not free from ambiguity and doubt. We believe that the Board, and not this Court, should undertake the task of clarification".[17]

Respondent's reliance on *N. L. R. B.* v. *Newport News Co.*, 308 U. S. 241 (Br. 282), is misplaced. For there the Court stated (at 244), "The Board's subsidiary findings of fact are not the subject of serious controversy," and it found (at 251) that the order of the Board was supported by "the uncontradicted facts."

IX. The Refusal to Strike Budenz' Testimony

A. Respondent argues that the government was not responsible for the failure to produce the Budenz recordings at a time when he was available for cross-examination because "neither Budenz nor government counsel knew" that the FBI recordings had been made (Br. 293). But (1) the FBI knew of the recordings, and (2) government counsel would have learned of their existence if he had not objected to petitioner's production demand and if the Board had not sustained him.

Respondent also seeks to avoid the government's responsibility on the grounds that the government's position

---

[17] Respondent's comments regarding other cases (Br. 283, ftn. 8) indicate nothing more than that the *Chenery* principle, which we urge, has been applied in a variety of factual situations.

had at the time "respectable, and perhaps majority, support in the courts of appeal" (Br. 294). This statement is incorrect.[18] Even if it were true, it would not absolve the government. It would be obviously unfair to prejudice one party because of the other party's mistake, even if the mistake were made in good faith. And where it is uncertain whether prejudice has resulted, fairness requires that the doubt be resolved against the party making the mistake. This is the whole point of the rule that where, in Wigmore's words (Pet. Br. 130), the tendering party has "responsibility of any sort" for the deprivation of cross-examination, all of the witness' testimony must be stricken without the need for showing that the deprivation was a material loss.

B. Respondent argues (Br. 295-98) that the deprivation of cross-examination was not a material loss. It acknowledges, however, that "petitioner could conceivably have shown by cross-examination on the basis of the recordings and notes serious inconsistencies which would affect the credibility of Budenz' other testimony" (Br. 294). The existence of that possibility in itself made the deprivation a material loss, requiring that all of Budenz' testimony be stricken even without regard to the government's responsibility for the deprivation (see Pet. Br. 131).[19]

---

[18] Prior to *Jencks* v. *United States*, 353 U. S. 657, the commonly held view was that the prior statements of a witness must be produced to the tribunal and made available to the cross-examiner if *in camera* inspection showed that they were inconsistent with the testimony. See e.g., *United States* v. *Krulewich*, 145 F. 2d 76; *United States* v. *Simonds*, 148 F. 2d 177; *United States* v. *DeNormand*, 149 F. 2d 622; *Boehm* v. *United States*, 123 F. 2d 791; *Crosby* v. *Pacific S. S. Lines*, 133 F. 2d 470; *United States* v. *Schneiderman*, 106 F. Supp. 731; *United States* v. *Lebron*, 222 F. 2d 531. Yet the Attorney General objected to petitioner's motions for *in camera* inspection of the Budenz statements, and the Board sustained him (R. 2187-89, 2217, 2225).

[19] Respondent minimizezs the possibility of discrediting Budenz on the ground that his testimony and statements show "no more than the usual discrepancies" (Br. 295). This assertion flies in the face of the facts (see Pet. Br. 132-39).

Respondent also contends (Br. 298) that "there is ample evidence that Budenz' other testimony was substantially correct." The Modified Report itself recognizes, however, that there are serious questions as to the credibility of Budenz' testimony on at least three important items in addition to the Starobin and Weiner matters (R. 2527, ftn. 73, 2592, ftn. 100, 2620, ftn. 120). In each case the Board credited Budenz.

X. The Refusals to Require Production of Witnesses' Statements

A. The Gitlow Memoranda

1. Respondent contends (Br. 303-04) that petitioner's demand for the Gitlow memoranda was over-broad because it was not limited to the portions relating to matters about which the witness had testified. But neither the Board nor the court below assigned this as a ground for refusing to order production of the memoranda. Petitioner, therefore, was not accorded a fair opportunity to make a more limited demand before the Board. Moreover, petitioner's motion for leave to adduce additional evidence was limited to those portions of the memoranda which related to the subject matters of Gitlow's testimony (R. 2797). Finally, even if petitioner's original demand was too broad, that would not justify the denial of production of those portions of the memoranda to which it was entitled.

2. Respondent argues (Br. 304) that the refusal to produce the Gitlow memoranda was harmless error because Gitlow's testimony was unimportant. But since neither the Board nor the court below so characterized it, there is no basis for concluding that they did not give significant weight to the testimony. On the contrary, the Modified Report relied on Gitlow's testimony to support findings that it considered highly material to the result (see Pet. Br. 139). Nor can respondent's contention be reconciled with the fact that Gitlow testified for eight full days on

direct examination and that the Attorney General introduced 119 exhibits through him (Tr. 1674-2530). The argument, therefore, is one more instance in which respondent as a litigant seeks to escape the consequences of error by denigrating testimony on which it relied as a tribunal. This it may not do. *Communist Party* v. *S. A. C. B.*, 351 U. S. 115, 123.

B. The Statements of Budenz and the Other Witnesses

Respondent claims that it would be unfair to the government to compel production of the statements of its witnesses six years after the close of the Board hearing (Br. 311-12). But if the Attorney General had not urged, and the Board adopted, an erroneous proposition of law, the documents would have been produced while the witnesses were on the stand.

Furthermore, respondent seems to acknowledge (Br. 312-13) that production would now be required if petitioner had repeated its motions *ad nauseam* after Board rulings had made repetition futile, or if petitioner had made the superfluous statement that it would not indulge in the repetition. We know of no rule requring lawyers to engage in such pettifoggery to preserve the rights of their clients.[20]

Respectfully submitted,

JOHN J. ABT,
320 Broadway,
New York, N. Y.,

JOSEPH FORER,
711 14th Street, N. W.,
Washington, D. C.,
Attorneys for Petitioner.

---

[20] We do not understand, and therefore do not reply to, respondent's answer (Br. 313-15) to our argument (Pet. Br. 143) that we were misled by Budenz, the Board and government counsel into believing that there were no verbatim statements of Budenz. Judge Bazelon, the one member of the court below who seems to have considered the matter, found that we were misled (R. 2696-97).